

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

SENSITECH INC. and DONALD W.
BERRIAN,

Plaintiffs,

vs.

TIME & TEMPERATURE COMPANY
d/b/a TIME 'N TEMPERATURE
CORPORATION

Defendant.

Case No. 04-11483MLW

DECLARATION OF STEPHEN DIRUBIO
IN OPPOSITION TO DEFENDANT'S
MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, TO TRANSFER VENUE

DECLARATION OF STEPHEN DIRUBIO

I, Stephen DiRubio, declare:

1. I am over the age of eighteen (18). I make this declaration of my own personal knowledge or on information and belief where so stated. If called as a witness, I could and would competently testify to the truth of the matters asserted herein.

2. I submit this declaration in support of Sensitech's Opposition to Defendant's Motion to Dismiss, or, in the Alternative, to Transfer Venue.

3. I am the Vice President and General Manager of Sensitech's Food Division. I have held the position of General Manager of the Food Division since January 2000 and was made a Vice President in August 2000.

4. This lawsuit involves electronic temperature monitoring devices that are used in shipping perishable goods, such as food items and pharmaceuticals. As Vice President and General Manager of the Food Division, I am responsible for sales and general business

management of Sensitech's temperature monitoring products in the domestic and Canadian food industry.

5. Sensitech sells a line of electronic temperature monitors called TempTale® monitors.

6. TnT also sells electronic temperature monitors under the names SmartChek, and QC Max, among others. (See printout from TnT's website, attached as Ex. A.)

7. It is well known in the food industry that perishable goods, such as fresh fruit and produce, can be damaged if they are exposed to temperatures above or below certain parameters during shipment.

8. For this reason, temperature monitors are traditionally used on trucks carrying perishable goods from a supplier, such as a grower of fresh produce (often called a "grower/shipper"), to a purchaser of those goods, such as a grocery store chain or food wholesaler (often called a "receiver"), to detect, record, and report temperatures experienced during shipment. It is common practice for receivers to require, as a condition of the purchase orders it issues, that a particular temperature monitor be placed on shipments and for a receiver to agree to reimburse the grower/shipper for the costs of the temperature monitor.

9. It is common practice for receivers to evaluate electronic temperature monitors, software, and associated services offered by various manufactures of such technology such as Sensitech and T'NT, to standardize its monitoring program on a particular brand of electronic monitoring device, and then to require that its perishable suppliers keep that particular brand of temperature monitor in stock and use it on all shipments to their warehouse.

10. Upon arrival of the shipping truck at the receiver's warehouse, receiving and inspection personnel will often check the temperature monitor in deciding whether to accept or reject the shipment of perishable goods.

11. Most of the electronic temperature monitors sold by Sensitech and TnT are single-use devices designed to be used for one shipment and then either discarded or recycled. Receivers who send used monitors back to the manufacturer for recycling receive rebates from the manufacturer for each returned unit.

12. Temperature monitors are sold directly to grower/shippers for use on shipments to receivers of perishable goods. Receivers often require such monitors on shipments destined for their warehouses and later reimburse the grower/shippers for the cost of the temperature monitor.

13. The majority of the TempTale electronic temperature monitors sold by Sensitech to produce growers and other shippers are purchased so that those shippers have them available for use on shipments to supermarket chains and other receivers that have made the affirmative decision to standardize their temperature monitoring program on Sensitech's TempTale monitors and software.

14. Based upon my experience and knowledge of the temperature monitoring industry, I believe that the majority of the single-use electronic temperature monitors sold by TnT to produce growers and other shippers are likewise purchased by those shippers to use on shipments to grocery chains and other receivers that have standardized their temperature monitoring program on TnT's monitoring products.

15. Upon information and belief, TnT has made direct arrangements with receivers of perishable goods whereby the receivers request that grower/shippers use TnT's monitors on shipments to that receiver. TnT has entered a number of such programs with receivers across the country, including accounts in Massachusetts, as reflected on the list of SmartChek users TnT faxed to perishable goods suppliers on March 22, 2002 attached as Exhibit A to the Declaration of David Vaught, Sensitech's Director of Sales for Supermarkets, who located this document in his files.

16. Upon information and belief, TnT sent "blast" faxes of this type to grower/shippers periodically to remind them to use SmartChek recorders on shipments headed for the receivers who had entered programs with TnT. This is reflected in the statement on the top of the list reading "Check this list for your customer's who request SmartChek digital recorders. Call 800-338-7295 to order."

17. This list shows that there were five accounts in Massachusetts that requested TnT's SmartChek digital recorders on their shipments: Alphas Chelsea-MA, Big Y Foods-MA, , C&S Wholesale-MA , Community Suffolk-MA, and Shaw's Supermarkets. Other stores on this list have a Massachusetts presence, such as Price Chopper, which has at least 12 stores in the Worcester area as well as stores in New York, Vermont, Connecticut, and Pennsylvania. (See printout from Price Chopper's website, Ex. B.)

18. Upon information and belief, the two largest companies of those five Massachusetts accounts are Shaw's Supermarkets and C&S Wholesale. Shaw's Supermarkets is a large New England-based grocery store chain headquartered in West Bridgewater, Massachusetts. (Ex. C, printouts from Shaw's website.) Since 1991, Shaw's has had a

distribution center in Methuen, Massachusetts, which is a cold storage facility that receives perishable goods shipments. (Ex C, printout from Shaw's website describing company history.)

19. C&S Wholesale is a large grocery distributor based in New England, which previously had its corporate headquarters in Brattleboro, Vermont and is now headquartered in Keene, New Hampshire. (Ex. D, printouts from C&S Wholesale's website.) At all relevant times C&S Wholesale has had facilities throughout New England, including three in Massachusetts (North Hatfield, South Hatfield, and Westfield). (Ex. E, printout from website showing warehouse locations.)

20. Based upon my experience and knowledge of the temperature monitor industry and Sensitech's experience with Shaw Supermarkets, which currently uses Sensitech temperature monitors, it is reasonable to estimate that TnT sold at least 1000, and perhaps as many as 1500, monitors per year as a direct result of the business agreement TnT reached with Shaw's to standardize its temperature monitoring on TnT technology.

21. Based upon my experience and knowledge of the temperature monitor industry, I reasonably believe that TnT would have records showing at least the following: marketing efforts directed toward Massachusetts receivers, including Shaw's, about entering a monitor program with TnT; documentation of sales calls or of the programs themselves; shipping/receiving records showing monitors that Massachusetts receivers returned to TnT, including returns from Shaw's Massachusetts distribution center; and accounting records showing recycling rebates issued to Massachusetts receivers, including to Shaw's at its Massachusetts headquarters.

22. TnT's website shows that TnT has international distributors of its products in many different countries (see attached printout, Exhibit F). An on-line industry advertisement states that "T 'N T products are distributed worldwide so contact us for agents in your area" and "Also we are always interested in developing new markets and distributors inquiries are welcome." (Food Online Time 'N Temperature Storefront, printout attached as Exhibit G.)

23. In addition to providing detailed product information, TnT's website also enables users of its monitors to download software for the SmartChek and QC Max monitors. (See attached printout, Exhibit H).

24. Sensitech is based in Massachusetts, where the company was founded and has its corporate headquarters (in Beverly), including 112 employees. Sensitech's senior management, officers, accounting, product development, assembly and engineering personnel are based in Beverly, Massachusetts. All of the engineering staff is located in Massachusetts and I am informed that 4 of the inventors named on patent at issue in this case live in Massachusetts; the other inventor lives in Maine. Product development, assembly and testing take place in Beverly, Massachusetts and documents relating to those activities are located in Massachusetts.

25. Sensitech has a small distribution depot in Fresno, California which has 1 full-time office manager/customer service representative, 1 full-time delivery driver, and 1 part-time shipping/inventory clerk. Sensitech has a similarly sized and staffed distribution depot in Upland, California and a two-person office in Davis, California having a field technician and a General Manager of Professional Services.

26. Sensitech has approximately 13 sales and field service representatives and contractors in both the food and life sciences (pharmaceutical) divisions working out of their


homes in various states, several of whom are located in California; these employees are balanced equally between the Eastern and Western parts of the United States.

27. To my knowledge, none of Sensitech's employees or representatives in California has any knowledge related to this patent infringement lawsuit.

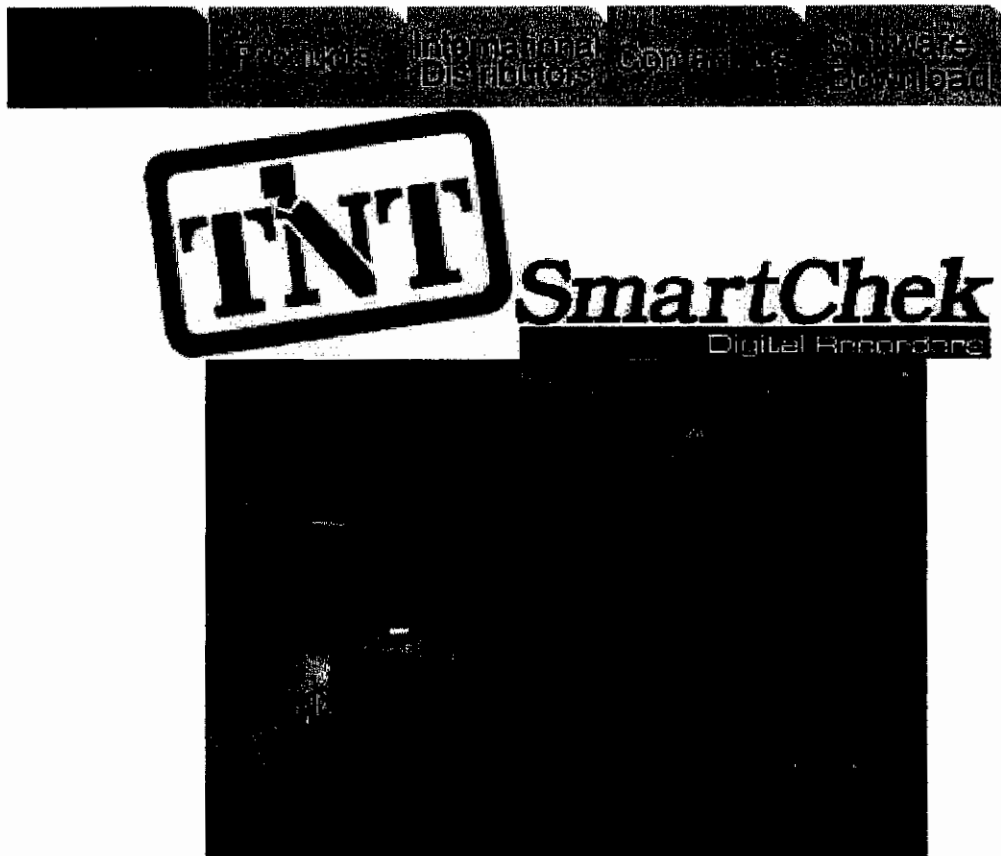
28. Sensitech also has a manufacturing facility in Redmond, Washington where mechanical stripchart monitors are made. None of Sensitech's products embodying the patented invention are made, designed, or distributed out of the Redmond facility. Sales management for the food industry, including myself, is also based in Redmond, Washington, as are a few accounting personnel and a person in charge of quality control. I frequently travel to Massachusetts, on average once a month, to meet with corporate management and perform other duties of my job.

I declare under penalty of perjury that the foregoing is true and correct.

Dated: August 20, 2004
Redmond, Washington



Stephen DiRubio



Time 'N Temperature Corporation

**Manufacturers and distributors of T 'N T Strip Chart recorders and
Smart Chek Digital in-transit recorders and on-site data loggers.**

If you deal with perishable or temperature sensitive commodities, as a supplier,

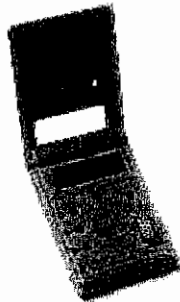
purchaser or both, we have important information for you.

**We can
assist
you to**

- Implement HACCP & QC procedures on-site to monitor your own in-house operations
- Provide monitoring of your quality product as it is transported to your customers
- Monitor your incoming temperature sensitive shipments to assure quality



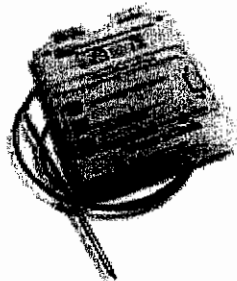
Click on a Product for More Details



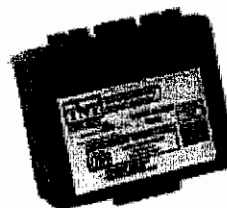
Designed to provide electronic accuracy with innovative features including a large LCD.



Time, temperature and day by day averages at the touch of a button. Download the data, fax, email easily.



Specifically designed to meet QC and HACCP requirements on-site.



Ideal for economical monitoring of time and temperatures during shipment by common carrier




SmartChek Elite Digital Recorder

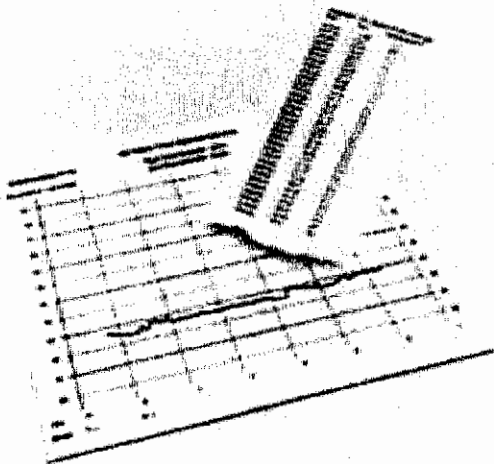
This is the most innovative digital recorder available for in-transit monitoring. We show **REAL NUMBERS** upon arrival – no guesswork, no red/green lights to interpret.

See the actual time & temperature on a large LCD **INSTANTLY UPON ARRIVAL!**

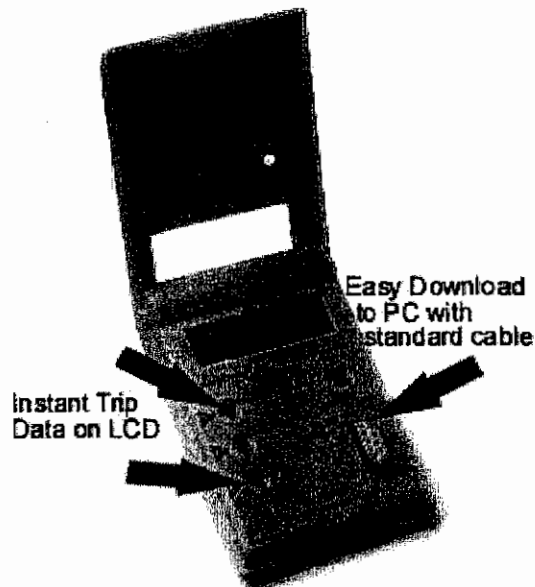
Security: SmartChek records even if not properly started and has tamper resistant program features.

 See average temperature information day by day

 High and low temperatures plus daily average



All time and temperature data shown in chart form or tabular listing with each temperature sampling by day and time.



Specifications

Temperature Range:	-20° to 120° F (-28.8° C to +50° C)
Sensing Element:	Rapid response thermistor $\pm 0.5^{\circ}\text{F}$ ($\pm 0.3^{\circ}\text{C}$)
Recording Time:	5, 10, 20, 40 and 80 days
Display:	LCD-Liquid Crystal Display
Security:	Custom Sleeve with factory seal
Weight:	Approx. 4 oz.
Dimensions:	4" h X 2 3/4" w X 7/8" d
Packaging:	10 and 30 units per box
Software:	Disk provided at no cost or from our web site

Easy to Use: Software is easy to use and available **HERE**. Just click on download button below. Or call our toll-free number and we will send a diskette at **NO CHARGE**.

No special interface is needed. SmartChek uses a standard DB9 cable. It prints charts on plain paper that is easy to mail, fax or e-mail.

[Download Software Now](#)

Introducing the New QCmax Digital in-transit recorder

Now is the time to switch from out-dated strip chart recorders to the innovative QCmax digital recorder. Use on domestic or export shipments. If you ship or receive perishable commodities such as:

Produce/fruits & vegetables	Pharmaceuticals
Fresh cut-value added	Chemicals
Meat / Fish / Poultry	Medical
Candy / Confection	Floral / Frozen Foods



You want facts? Trust QCmax!

QCmax digital recorders for all temperature sensitive commodities that require accurate temperature monitoring. Put our 30 years experience to work for you. QCmax digital recorders are easy to use! No reader or special interface table.

QCmax Digital in-transit recorders are manufactured and distributed by Time 'N Temperature Corp. Ventura, CA, USA. Since 1972 providing quality & reliability in monitoring temperature sensitive commodities.

TNT

tel 1 800 338 7295
fax 1 805 650 0610
www.qcmaxrecorders.com

QCmax

CE ISO9002

Features Specifications Download Software

EXHIBIT B



BEST in FRESH & LOW PRICES

Serving communities in
New York, Massachusetts, Vermont, Connecticut, Pennsylvania and New Hampshire.



Friday, August 20, 2004

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Our History

A Company on the Move

In 1990, we acquired 13 stores in the greater Vermont area and 1 in Cobleskill, NY. New York State stores continued to abound with the openings of stores in Wilton and Ogdensburg in 1991. Menands and Walkill stores opened in 1992. Kingston was added to the Pennsylvania roster in 1993, the same year Poughkeepsie, NY came on with two units.

In October, 1995 we purchased 12 Big D stores in the Worcester, MA area. Part of this strategic plan was to make improvements and to bring the latest technology, marketing and expanded product lines to the marketplace over the following few years.

In the mid 1990's, Rutland and St. Johnsbury stores opened in Vermont and Vails Gate opened in New York. We opened our first Connecticut store in Torrington in 1996.

1997 saw new stores open in Norwich, Bethlehem, Granville, and Saratoga Springs, NY, as well as Worcester Fair, MA. Ground breakings were held for other grand openings to take place in 1998, which began with the opening of the Marlboro store in Massachusetts and the St. Albans store in Vermont. Our Glen Street store in Glens Falls, NY reopened as the largest store in the chain at the end of June, 1998.

The Golub Corporation has always remodeled existing stores and acquired others' leases. We've added pharmacies, in-store scratch bakeries, custom cut meat shops, seafood departments, a kosher store and Super Centers. Today we operate stores in New York, Vermont, Connecticut, Pennsylvania and Massachusetts.



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EXHIBIT C



CORPORATE STATEMENT

West Bridgewater, MA, March 26, 2004 – A Stock Purchase Agreement has been signed by Albertson's, Inc. of Boise, Idaho to acquire the holding company that owns Shaw's Supermarkets and Star Markets. The closing, subject to regulatory approvals, is expected to take place in the next 30-45 days.

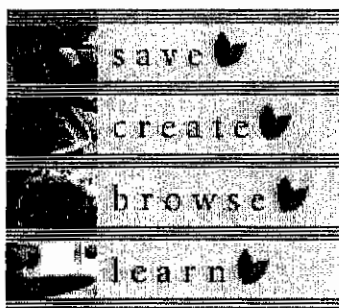
"We believe this exciting, new relationship with Albertsons will be beneficial for both companies and allow Shaw's to retain its leadership position in the New England marketplace," said Shaw's President & CEO Paul Gannon. "Our customers, associates and vendors should be assured we are working toward a seamless transition. This is a win-win for both companies."

Gannon added, "The stores will continue to operate under the Shaw's or Star banners. Shaw's will continue as an operating division of Albertsons with headquarters in West Bridgewater, Massachusetts. The scale of Albertsons puts Shaw's in an even better position to compete in today's marketplace."

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company history



Company History

Today, Shaw's Supermarkets, Inc. consists of stores throughout Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut and Vermont and serves more than 4 million customers each week. Like many U.S. supermarket chains, Shaw's had humble beginnings. Its success and growth over the last 140 years are rooted in the ingenuity of two New England traditions: George C. Shaw's of Portland, Maine and BPM stores of Brockton and New Bedford, Massachusetts.

THE EARLY YEARS

In the late 1850's, a young Vermonter named George C. Shaw opened a small tea shop in Portland, Maine. Popular for its selection of exotic teas from the Orient, George C. Shaw became known for all kinds of fresh foods and groceries.

Meanwhile, an ambitious young New Englander named Maynard A. Davis had moved from Maine to Massachusetts to seek his fortune. He established a group of small downtown grocery stores in the Brockton and New Bedford areas called Brockton Public Market or BPM stores.

In 1919, Mr. Davis purchased the George C. Shaw Company of Portland and made it a subsidiary of BPM. Davis made his eldest son, Halsey, president of George C. Shaw and a younger son, Stanton, president of BPM.

EXPANSION AND GROWTH

As George C. Shaw's and BPM stores continued to grow, Stanton Davis decided that operating a central grocery warehouse for both would provide an excellent base for future growth and expansion of the two companies. In 1961, he bought a three-story warehouse structure in Brockton, Massachusetts.

By 1965, George C. Shaw had begun to move outside Greater Portland into other areas of the state and into Northern Massachusetts and New Hampshire. This expansion, combined with BPM's growth in volume in Southern Massachusetts moved the companies to build a distribution center in East Bridgewater, Massachusetts in 1972. In 1979, the facility was enlarged to 434,000 square feet and supplied all stores in Maine, New Hampshire, and Massachusetts with not only groceries but also produce, meats, dairy products, frozen foods, delicatessen items, cigarettes and a limited number of housewares.

The 1980's also brought about additional distribution capacity. A new 480,000 square foot warehouse was built between Boston and Portland to minimize freight costs. The new facility in Wells, Maine now serves all Shaw's stores.

In January of 1991, Shaw's opened a 300,000 square foot distribution facility for all perishable food items in Methuen,


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Massachusetts. This facility serves all of the store locations.

THE MERGER

In 1978, BPM stores in Massachusetts changed their name to Shaw's Supermarkets, Inc. to maximize advertising. It was the first step in the contemplated merger of the two companies. The next step came in September of 1979, when BPM, who owned 82% of the voting stock, offered Shaw's stockholders cash or BPM stock. Most took stock and became stockholders in the newly merged company, Shaw's Supermarkets, Inc.

J SAINSBURY

In November 1983, Shaw's board of directors, in a decision which again underscored Shaw's commitment to excellence, allowed J Sainsbury, England's largest supermarket company, to purchase 21% of Shaw's outstanding stock. In June of 1987, Sainsbury's acquired controlling interest, one year after Shaw's had reached its billion dollars sales mark.

THE ACQUISITIONS

Since 1987, Sainsbury has acquired stores from four other New England food retailers: Iandoli's, the Edwards Food Stores, Cerretani's and the Star Market Company. In 1987 Sainsbury purchased the Iandoli Supermarket Company located in the Worcester area of Massachusetts. Like future acquisitions by J Sainsbury, many of the associates from the Iandoli supermarket chain continue to work in Shaw's offices and store locations.

In 1993, Sainsbury purchased three supermarket locations from the Cerretani Supermarket Company. On May 22, 1994, the Melrose and Revere stores officially opened as Shaw's Supermarkets. These two stores were an excellent starting point for Shaw's future Greater Boston growth and development through acquisition.

It was an exciting year in 1995 when Shaw's entered the state of Connecticut. It started with five brand new stores and then in 1996 Sainsbury purchased twelve former Edwards supermarkets and two future sites from Royal Ahold. This purchase would more than triple the number of Shaw's locations in Connecticut. By the beginning of 1999, there were 21 store locations in the state.

The largest supermarket chain to join the Shaw's family is the Star Markets Company of Cambridge, MA. In June of 1999, to further strengthen Shaw's position as the second largest supermarket company in New England, Sainsbury purchased their stores and distribution center. The acquisition of Star Markets greatly enhances the visibility of Shaw's in the Greater Boston market area.

Like Shaw's, the Star Market Company that was founded in 1915 had humble beginnings and a long line of "firsts" in the supermarket industry. Star Markets was the first New England supermarket company to have air conditioned stores, touch method of ringing registers, in-store check verification, refrigerated cooked foods, self-service wrapped meats and packaged produce. Also, Star is known for its innovative formats and its new ideas; i.e., Wild Harvest natural foods.

SHAW'S TODAY

Today, Shaw's continues to thrive, grow, and set new standards for the supermarket industry. Although advancements in

management and marketing have contributed to Shaw's success, it is the company's ongoing emphasis on attentive customer service, high quality products and continued expansion that have been the hallmarks of its leadership position for more than 140 years.

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EXHIBIT D